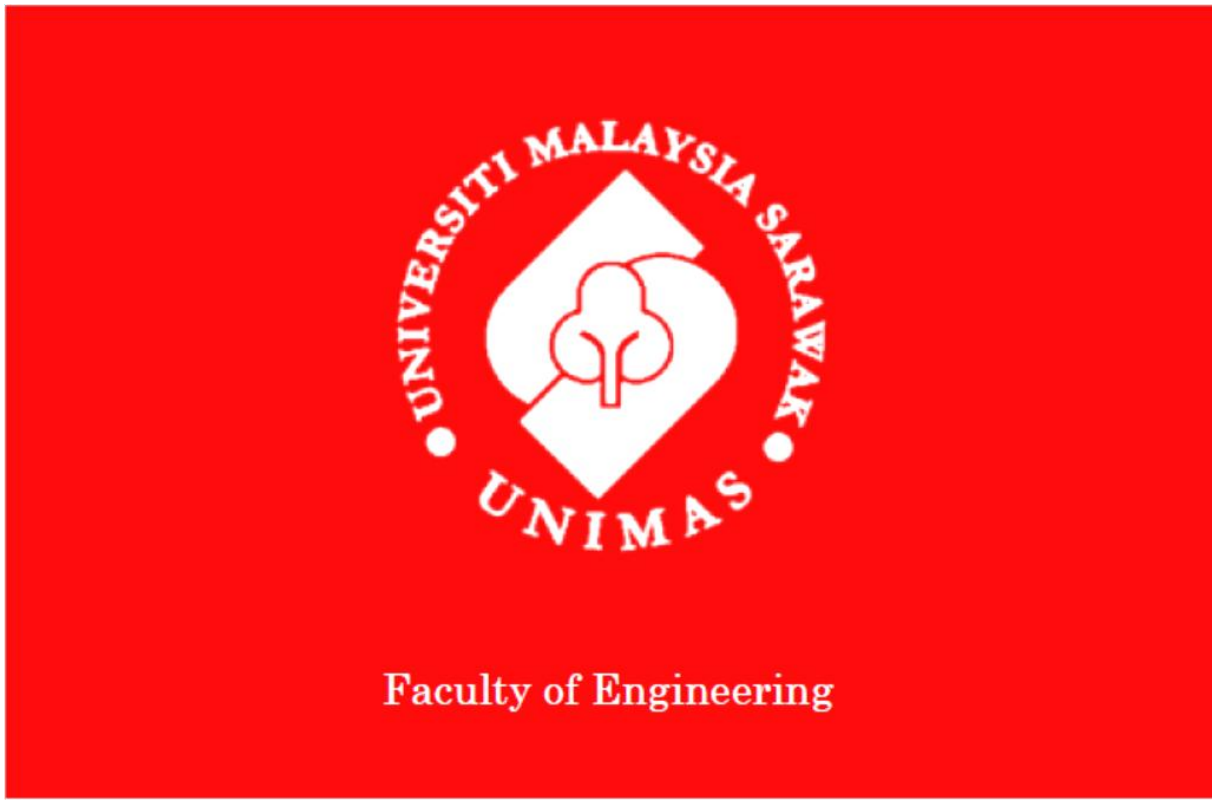

STANDARD FORM OF CONSTRUCTION CONTRACT: A STUDY OF THE APPLICATION OF *Fèdèration Internationale des Ingènieurs- Conseils* (FIDIC) IN MALAYSIA

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Bachelor of Engineering with Honours

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UNIVERSITI MALAYSIA SARAWAK

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STANDARD FORM OF CONSTRUCTION CONTRACT: A STUDY OF THE APPLICATION OF *Fèdèration Internationale des Ingènieurs- Conseils* (FIDIC) IN MALAYSIA

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Thesis is submitted to

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In Partial Fulfillment of the Requirements

For the Degree of Bachelor of Engineering

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To my beloved family and friends

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ABSTRACT

In line with this development in Standard Form of Contract in Malaysia, this research attempts to examine the application of *Federation Internationale des Ingenieurs-Conseils* (FIDIC) in Malaysian construction's industry since its publication in 1987. Due to the lack of experience and knowledge for local contract users to use FIDIC, semi-structured interviews on eight professional respondents from west and east Malaysia who had used FIDIC were chosen to interview in this research. It concludes that FIDIC was not widely used but it is still applicable when it comes to international funded by the World Bank.

ABSTRAK

Selaras dengan perkembangan borang-borang kontrak setara di Malaysia, kajian ini cuba menyelidiki penggunaan Federation Internationale des Ingenieurs- Conseils (FIDIC) dalam industry pembinaan dalam Malaysia sejak tahun publisi 1987.Oleh kerana kekurangan pegalaman dan pegetahuan tentang FIDIC oleh pengguna tempatan, wawancara semi-berstruktur pada lapan responden professional dari Semananjung Malaysia dan Sarawak yang telah menggunakan FIDIC dipilih untuk wawancara di penelitian ini. Pengunaan FIDIC masih dihadkan masa kini tetap masihi digunakan apabila pegedalian projek-projek yang dibiayai oleh Bank Dunia antarabangsa.

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LIST OF ABBREVIATIONS

CIDB - Construction Industry Board Malaysia

ECC - Engineering and Construction Contract

FIDIC - Fèdèration Internationale des Ingènieurs- Conseils

ICE - Institute of Civil Engineering, UK

ISM - The Institution of Surveyors, Malaysia

NEC - New Engineering Contract

PAM - Pertubuhan Arkitek Malaysia

PWD - Public Works Department

RIBA - Royal Institution of British Architects

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CHAPTER 1

INTRODUCTION

1.1 General

All construction work is done within a contract except that done by a person for himself. Contract is a means of action in commence and industry and most other human affairs, and we must understand something about contracts if we wish to understand contracting and construction management (Coiller, 2001).

A contract is an exchange of promises between two or more parties doing or refraining from doing an act which is enforceable in a court of law. According to Williams (1992), a contract can be defined as a legally binding agreement between two parties or exchange of promises whereby one party undertakes to provide something in return for something else from another party. Coiller (2001) on the other hand defined contract as promises enforceable by law and there must be genuine intention on the part of the parties to take on obligations agreed to in a contract.

A civil engineering construction contract is one on which the contractor's principal obligation is to carry out works of civil engineering construction. The contract may also oblige the contractor to carry out ancillary obligation such as the maintenance or operation of the works. Civil engineering contracts are by and large made interpreted and enforced in the same way as any other commercial contract (Clarke and O'reilly, 1999).

As mentioned by Williams (1992), in order to produce a legally binding contract, all contracts must meet certain primary ingredients. Firstly, there must be a meeting of the minds between parties regarding the purpose of the contracts. If a meeting of the mind is achieved by the offer and acceptance, the contract will be created. Both parties in a contract must then contribute something of value to the bargain demonstrating good faith. That contribute is known as consideration.

Clarke and O'reilly (1999) stated that a contract has a number of different functions. A construction contract includes:

i. specifying the work to be done by the contractor (or subcontractor etc.), including the required quality and time for completion of various parts of the work;
ii. defining what amount is to be paid, how any additional or reduced payments are to be computed and when payments are to be made;
iii. defining which party is responsible for events occurring outside the parties' which affect the work. Such events may include in the law, unexpectedly poor ground, etc.

iv. defining who has responsibility for undertaking the various administrative or dispute resolution function which may be required, including obtaining consent, giving instructions, making decisions about claims, appointing adjudication and arbitrators.

1.1.1 Standard Form of Contract

Standard forms are normally in a printed form and published by an authoritative body of the industry which is recognised by both parties. These forms set out the terms or conditions on which the contracts between the parties are to be carried out. It is also noted that these terms or conditions are deemed to be agreed and are not subject to further negotiation and/or amendment. Standard forms are generally suitable for a wide range of common projects or works (Singh, 2004).

The standard forms of construction contracts commonly used in Malaysia include the PAM98 form issued under the sanction of the *Pertubuhan Arkitek Malaysia*; JKR or PWD forms issued by the Public Works Department of Malaysia, CIDB standard form of contract for Building Works issued by the Construction industry Development Board, IEM forms issued by the Institute of Engineers of Malaysia, FIDIC forms and the ICE forms issued by the Federation of Civil Engineering Contractors.

Building contracts some 30 years ago were all based upon United Kingdom's Joint Contracts Tribunal (JCT) Standard Form 1963, albeit with amendments. On the

other hand, Civil Engineering contracts were based on the Institution of Civil Engineers (ICE) of *Fèdèration Internationale des Ingènieurs-Conseils* (FIDIC) Conditions. These are however something of many years ago. We are now faced with innumerable forms of contract, and its release into the market has become something of a fashion (McInnis, 2001).

It should be noted that the fourth and earlier editions of the FIDIC forms of Contract, intended for civil engineering works and major buildings projects, are not frequently used in construction projects in Malaysia.

1.1.2 FIDIC

FIDIC's vision is to be the recognized global voice for the consulting engineering industry. Its mission is to improve the business climate and promote the interests of consulting engineering firms, globally and locally, consistent with the responsibility to provide quality services for the benefit of society and the environment.

Key objectives are to represent globally the industry and to promote the development of a global and viable industry, to enhance the image of consulting engineers, to be the authority on issues relating to business practice, and to promote quality, conformance to a code of ethics, business integrity and commitment to sustainable development. Member firms endorse FIDIC's statutes and policy

statements and comply with FIDIC's Code of Ethics which calls for professional competence, impartial advice with open and fair competition.

FIDIC manages publications, capacity building programmes and events in the furtherance of its goals: maintenance of high ethical and professional standards; exchange of views and information; discussion of problems of mutual concern among Member Associations and representatives of the international financial institutions; development of engineering consulting in developing countries. Publications include proceedings of conferences and seminars, information for consulting engineers, project owners and international development agencies, and standard forms of works and client-consultant contracts. Events include the FIDIC annual conference, workshop and seminars on best practice, and capacity building events based on the FIDIC training manual.

Padilla (2001) reiterated the position of FIDIC on integrity management, namely, that FIDIC must represent and promote ethical business practices throughout the industry, and work with others to achieve this objective.

In addition, FIDIC promotes best business practices and believes that quality and integrity management are intimately interrelated. Therefore, FIDIC advocates those member firms to engage in integrity management as an extension of their quality processes.

FIDIC promotes the Integrity Approach in businesses practices. In order for one to operate successfully in an increasingly global world, a firm's procedures will

have to conform to generally accept best practices. In particular, ethical behaviour toward all the firm's stakeholders must be keyed and visible. FIDIC promotes ethical business practices throughout the industry and for this purpose, works and co-operates with other organisations in the development and implementation of various initiatives to combat corruption.

In addition to promoting integrity business practices on the "supply side" of corruption, FIDIC collaborates closely with multilateral development banks in the implementation of initiatives to fight the "demand" and the "condoning" sides.

It should be noted that the fourth and earlier editions of the FIDIC forms of Contract, intended for civil engineering works and major buildings projects, are not frequently used in construction projects in Malaysia. However, despite the fact that Malaysia's legal system and common law is to a large extent derived from that of the United Kingdom, the FIDIC Form appears not to have received widespread application for domestic contracts. This is particularly in light of certain local standard forms which has received widespread use.

1.2 Problem Statement

From the literature review, it is found that FIDIC was the question of the operation of the former FIDIC Conditions of Contract for Construction "Red Book" under French laws and other jurisdiction was discussed in the IBA International Construction Projects Committee. In general, the FIDIC Conditions are regarded as

unreasonable, one sided and basically putting clients into disadvantage, even if foreign contractors do not think so with regard to different practices. They do not think twice about wording of the conditions, since they present their everyday practice.

Historically, the public sector in those countries have led the way for FIDIC to be adopted or used in response to the national tendering laws and the corresponding requirements of various government ministries. It is worth noting from our previous articles on FIDIC that although the Emirate of Abu Dhabi has recently and officially adopted the FIDIC form, the Emirate of Dubai. Lawyers who have trained in civil law jurisdictions in the Middle East often do not appreciate the English legal concepts underpinning those conditions. The issue of language to be adopted in a FIDIC contract is critical and not to be underestimated.

A study by Bunni (1986) revealed that 86% of the sentences in the FIDIC contract could be understood by on 4% of the population, equivalent to those with an IQ of 130 or more. It is apparent that traditional conditions of contract do not achieve clarity.

Broome (1999) also notes the emergence of an increasingly international market for engineering and construction services. Of the wide range of traditional engineering and construction contracts published, the FIDIC Contract has been the only accepted international form of contract. However, according to Henriod (2002) and Bunni (1986), the lack of comprehensibility of that form has resulted in a history of court cases to interpret clauses.

On the other hand, FIDIC conditions of contract have been widely used in China for the construction work financed by the World Bank, Asian Development Bank and other international financial institutions. Now, more and more China's construction companies have become familiar with the FIDIC conditions of contract.

As Malaysia is on the phase of developing, and to follow the footstep of those who have far developed, Malaysia have also widely use FIDIC for the construction work which were proposed or projected by the World Bank. One of the projects done recently was the water project reaching financial or contractual closure in 2007. The project, called Sungai Lolo Water Treatment Plant was semi sponsored by Puncak Niaga Holdings Berhad (The World Bank Group, 2008).

1.3 Hypothesis

With many problems detected in FIDIC applications elsewhere, one should question the application of FIDIC form of contract in Malaysia, especially if such usage were not localised.

1.4 Aim and Objectives

The aim of this study is to analyze whether FIDIC is applicable in Malaysia. In order to achieve the aim of the research, the following objectives have been suggested:

i. to investigate the usage of FIDIC form of contract in Malaysia;

ii. to investigate whether the benefits claimed by the publishers of FIDIC are actually realised in its usage in Malaysia;

iii. to look into the suitability of FIDIC form of contract for Malaysian construction industry;

iv. to suggest changes to make the contract more effective.

1.5 Structure of Thesis

Chapter 1 sets the background of the study, identifies the problem statement, and determines the hypothesis and objectives, scope of the study and structure of thesis.

Chapter 2 is the literature review on some related papers and journals about FIDIC form of contract and general conditions in different standard form of construction contracts. This chapter also explains the usage and problems of FIDIC.

Chapter 3 describes the methodology which is formed from analysis of research data and information collected. The research methodology sequence shows the flow of the study from early to the end.

Chapter 4 is about the result analysis from 10 respondents, including their background and comments regarding the usages of FIDIC.

Chapter 5 discusses the result analysis in further details.

Chapter 6 concludes the whole research, stating the research findings and constraints. It also provides some recommendations for this research followed by possible topics for future research.